



CONFLICT OF INTEREST

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Introduction

Conflicts of interest can arise in many different ways, and often become apparent at the last minute without warning. Trying to determine whether an official has a conflict of interest in such circumstances can be very difficult. This guide is intended to assist you in making that determination.

In using the guide, several caveats should be kept in mind. First, it is only a summary, not a treatise, on conflicts of interest. It does not attempt to address all situations or problems you may encounter as a public official. Those situations that the guide does cover are greatly simplified. Second, the guide deals only with conflicts of interest arising under the Political Reform Act. While this is the most common type of conflict of interest, there are other statutes which deal with conflicts of interest. A brief description of some of these other forms of conflicts of interest are contained at the end of the guide.

Finally, this guide does not constitute legal advice. If you are uncertain about whether or not a conflict of interest exists, you should contact legal counsel. As always, the attorneys at Kronick are available to answer any questions you may have. Please contact our Public Agency Practice Group at (916) 321-4500. You can also seek advice from the Fair Political Practices Commission ("FPPC").

For More Information

The FPPC may be contacted at:

Fair Political Practices Commission

428 "J" Street, Suite 620

Sacramento, CA 95814

(916) 322-5660 or (866) ASK-FPPC

or advice@fppc.ca.org

www.fppc.ca.gov

The text of the Political Reform Act may be found beginning at Government Code section 87100. FPPC regulations on which this guide is based may be found at 2 CCR section 18700, et seq.

Conflicts of Interest: To Vote or Not to Vote

The heart of the Political Reform Act is that it prohibits a public official at the state or local level from *making, participating in, or attempting to influence a governmental decision in which he or she knows or has reason to know she has a financial interest.*

There are five basic questions that, you, as a public official need to ask yourself in determining whether or not you have a conflict of interest:

1. Are you making, participating in, or using your "official position" to influence a governmental decision?
2. Do you have a financial interest in the decision?

3. Is an effect on your financial interest reasonably foreseeable?
4. Will the decision have a material effect on your financial interest?
5. Is the effect of the decision on your financial interest distinguishable from its effect on the general public?

If you answered yes to all of the above questions, you probably have a conflict of interest and must disqualify yourself from participating in the decision.

If after using this guide you remain uncertain whether or not you have a conflict and there is inadequate time to seek advice, the safest course of conduct is to assume you have a conflict and to abstain from participation.

QUESTION 1

Are you making, participating in, or using your “official position” to influence a governmental decision?

The Political Reform Act applies only when you are making or participating in a “decision,” which is very broadly defined.

- A. Are you influencing, voting or participating in a decision regarding ordinances, regulations or resolutions; contract awards, purchases or leases; hiring, firing or other personnel actions; appointing a person; zoning permits, variances or other land use issues; policies; or any other decision coming before you in your role as a public official?

Yes ☐ No ☐

- B. Are you providing information, responding to comments, giving an opinion, taking part in discussions, or making recommendations for the purpose of affecting a decision?

Yes ☐ No ☐

- C. Are you in any way using your “official position” to influence the outcome of a governmental decision?

Yes ☐ No ☐

Remember that whether you vote for or against an issue or for or against your financial interest, you are still making a governmental decision.

If you answered yes to any of the above questions, you need to answer **Question 2**. If you answered no to all of the above, you probably do not have a conflict of interest.

QUESTION 2

Do you have a financial interest in the decision?

The Political Reform Act defines what types of financial interests pose potential conflicts of interest. At this stage, you must identify what financial interests may be at stake.

- A. Will the decision affect any business in which you, your spouse or dependent children have an investment of at least \$2,000?

Yes ☐ No ☐

B. Will the decision affect any real property (including mortgages, options, or leases) in which you, your spouse or your dependent children have an interest of \$2,000 or more (excludes month-to-month leases)?

Yes ☐ No ☐

C. Will the decision affect a source of income from which you, your spouse, or your dependent children, have earned an amount aggregating more than \$500 during the previous 12 months?

Yes ☐ No ☐

D. Will the decision affect a source of gifts from which you, your spouse, or your dependent children have received an amount aggregating more than \$470 during the previous 12 months?¹

Yes ☐ No ☐

E. Will the decision affect any for-profit business in which you are a director, partner, officer, trustee, manager, or employee?

Yes ☐ No ☐

F. Will the decision affect your personal finances (other than as indicated in items A-E above), including your expenses, assets, or liabilities, or that of your spouse or dependent children?

Yes ☐ No ☐

¹ Note that the gift limit for the period January 1, 2017 through December 31, 2018 is \$470.

If you answered yes to any of the above questions, you need to answer **Question 3**. If you answered no to all of the above, you probably do not have a conflict of interest.

QUESTION 3

Is an effect on your financial interest reasonably foreseeable?

A. Reasonably foreseeable, financial interest explicitly involved:

Is the financial interest identified in Question 2, above, a named party in, or the subject of, a governmental decision before you or your agency? (A financial interest is the subject of a proceeding if the decision involves the issuance, renewal, approval, denial, or revocation of any license, permit, or other entitlement to, or contract with, the financial interest, and includes any governmental decision affecting a real property financial interest.)

Yes ☐ No ☐

B. Reasonably foreseeable, financial interest not explicitly involved:

Is it a realistic possibility that the financial effect will occur as a result of the decision or action? (FPPC regulations contain a number of considerations that must be evaluated to determine if the financial effect on an interest that is not explicitly involved is reasonably foreseeable, and thus the resolution of this question typically requires analysis by legal counsel.)

Yes ☐ No ☐

If you answered yes to any of the above questions, you need to answer **Question 4**. If you answered no to all of the above, you probably do not have a conflict of interest.

QUESTION 4

Will the decision have a material effect on your financial interest?

“Materiality” is a measure of whether or not the potential conflict is large enough to require disqualification. For potential conflicts involving sources of income and gifts, materiality depends upon whether or not your financial interest is **explicitly or not explicitly** involved in the decision. Even if a financial interest is not explicitly involved in a decision, the interest may still be disqualifying “if the financial effect can be recognized as a realistic possibility and more than hypothetical or theoretical.” Different materiality rules apply for each type of financial interest. Determining if a decision is material or not is complex. You may wish to consult legal counsel or the FPPC for advice.

A. Business entities:

1. Does the decision involve a business entity in which you have a financial interest, and which initiated the subject proceeding with the public agency?

Yes ☐ No ☐

- 2 Does the decision involve a business entity in which you have a financial interest, and the business entity has

offered to make a sale of product or service, bid on a contract, or is a named manufacturer on a purchase order with the agency?

Yes ☐ No ☐

- 3 Does the decision involve a business entity in which you have a financial interest, and the business entity has applied for a permit, license, tax credit, or other entitlement from the agency?

Yes ☐ No ☐

- 4 Does the decision involve a business entity in which you have a financial interest, and which is the subject of any inspection, enforcement action, or proceeding subject to the regulatory authority of the public agency?

Yes ☐ No ☐

5. Could a prudent person with sufficient information find it reasonably foreseeable that the decision's financial effect would contribute to a change in the price of the business entity's publicly traded stock, or the value of a privately held business entity?

Yes ☐ No ☐

B. Real property:

1. Leasehold Interest

If your financial interest involves a lease, does the decision: (a) change the termination date of a lease; or (b) change the potential rental value of the property; or (c) change the actual rent, and you have a right to sublease

the property; or (d) change the allowable use of the property; or (e) change your use and enjoyment of the property?

Yes ☐ No ☐

2. Non-Leasehold Interests

a. If your financial interest involves a **non-leasehold** interest (such as direct ownership), does the decision directly involve real property in which you have a financial interest (e.g., your property is named in an agreement, or application for a permit, or entitlement)?

Yes ☐ No ☐

b. If your financial interest involves a **non-leasehold** interest (such as direct ownership), could the decision influence the market value of the property in which you have a financial interest (for example through the construction of improvements to infrastructure serving your property by changing the development potential of the property, or by changing the income-producing potential of the property, or by otherwise changing the character of your property such as by substantially altering traffic levels or intensity of use, air quality or noise levels)?

Yes ☐ No ☐

c. Does the decision affect the value of real property within 500 feet of your property? ²

Yes ☐ No ☐

C. Sources of income:

1. For sources of income (not including governmental salary) **directly** involved or impacted by the decision, for example, as a contracting party, claimant, applicant or appellant: Does the decision directly involve a source of income to you or your spouse or dependent children?

Yes ☐ No ☐

2. For sources of income **indirectly** involved or impacted by the decision: if the source of income is an individual does the decision: (a) affect that individual's income or promised income of \$500 or more in the previous 12 months; or (b) affect that individual's real property as described under indirectly involved real property?

Yes ☐ No ☐

3. For business entity sources of income **indirectly** involved or impacted by the decision: If the source of income or gifts is a business entity other than a nonprofit, the same rules apply as for indirectly involved business entities (see Section A above).

Yes ☐ No ☐

² If the decision affects property within 500 feet of your property, a conflict is assumed unless you obtain written advice from the FPPC allowing you to participate.

4. For non-profit sources of income **indirectly** involved or impacted by the decision: Will the decision have a measurable financial effect on the nonprofit entity?

Yes ☐ No ☐

C. Sources of gifts:

1. For sources of gifts **directly** involved in the agency action, for example, as a contracting party, claimant, applicant or appellant: Does the decision directly involve a source of gifts to you or your spouse or dependent children?

Yes ☐ No ☐

2. For sources of gifts **from individuals indirectly** involved or impacted by the decision: If the source of income or gifts is an individual, does the decision: (a) affect an individual who has given you gifts totaling \$470 or more in the previous 12 months; or (b) affect that individual's real property as described under indirectly involved real property?

Yes ☐ No ☐

3. For business entity sources of gifts **indirectly** involved or impacted by the decision: If the source of income or gifts is a business entity **other than a nonprofit**, the same rules apply as for indirectly involved business entities.

Yes ☐ No ☐

4. For **non-profit sources of gifts indirectly** involved or impacted by the decision: Will the decision have a measurable financial effect on the nonprofit entity?

Yes ☐ No ☐

C. Personal financial effects:

Will the decision result in a measurable financial benefit or loss to you, your spouse, or your dependent children?

Yes ☐ No ☐

Unless your situation falls into one of the exemptions listed on page 16, or unless the financial effect is nominal, inconsequential or insignificant, if you answered yes to any of the above questions, you need to answer **Question 5**. If you answered no to all of the above, you probably do not have a conflict of interest. Resolution of questions involving indirect interests may require complex analysis. If you are still unsure about whether your situation poses a conflict of interest, you may wish to consult legal counsel or the FPPC for advice.

QUESTION 5

Is the effect of the decision on your financial interest distinguishable from its effect on the general public?

Even when your financial interest is materially affected, the Political Reform Act provides for an exception when a public official's financial interest is affected in the same general way as a "significant segment of the public." There are a number of complex FPPC regulations governing whether the exception applies and what constitutes a significant segment of the public. If you intend to rely upon this exception, you should consult legal counsel or the FPPC for advice. The following are common examples:

A. Business entities:

If your financial interest is a business entity, does the decision affect less than 25% of the businesses in a single industry, trade, or profession in your jurisdiction in substantially the same manner?

Yes ☐ No ☐

B. Real Property:

If your financial interest is real property, does the decision affect less than 25% of all the real property, commercial real property, or residential real property in your jurisdiction in substantially the same manner?

Yes ☐ No ☐

C. Individual:

If your financial interest is a source of income or gifts or the personal expenses, assets or income of yourself or your family, does the decision affect less than 25% of individuals in your jurisdiction in substantially the same manner?

Yes ☐ No ☐

If you answered yes to any of the above questions, you likely have a conflict of interest. If you answered no to any of the above, you probably do not have a conflict of interest. If you are still unsure about whether your situation poses a conflict of interest, you may wish to consult legal counsel or the FPPC for advice.

Exemptions

If the decision pertains to the following, it is exempt from application of the Political Reform Act conflict of interest prohibitions:

A. Does the decision solely concern repairs, replacement or maintenance of existing street, water, sewer, storm drain or similar facilities?

Yes ☐ No ☐

If you answer yes to this question, the decision is exempt and you do not have a conflict of interest.

B. Does the decision solely concern the adoption or amendment of a general plan and 1) the decision was not initiated by you or your representative, 2) the decision requires further decision by the agency before implementation may occur (such as rezoning or licensing), 3) the decision does not concern a discernible parcel(s) or development project, and 4) the decision does not concern the agency's prior, concurrent, or subsequent approval or change of a land use decision?

Yes ☐ No ☐

If you answer yes to this question, the decision is likely exempt and you do not have a conflict of interest. However, the factors set forth in California Code of Regulations, Title 2, section 18702.2(c), pertaining to conflicts arising from general plan adoption or amendment, require nuanced legal analysis and we recommend you confer with your

legal counsel or the FPPC to confirm the application of this exemption to your particular situation.

What to Do in the Event of a Conflict

If you have determined that you have a conflict of interest, you must take action to avoid personal liability. You must:

1. Publicly disclose the existence of the conflict.
2. Explain the nature of the conflict.
3. Abstain from discussion of or attempting to influence the decision, including prehearing negotiations.
4. Abstain from voting.
5. Leave the room during consideration of the decision (unless the item is on the consent calendar).
6. Ensure that your disclosure and abstention are reflected in your board's minutes or records.

Violations of the Political Reform Act

Violations of the Political Reform Act can result in severe penalties. These may include civil penalties imposed by the FPPC, or imposition of criminal sanctions including fines or imprisonment.

Advice Letters

Kronick provides advice on the Political Reform Act and conflicts of interest. Compliance with that advice is not, however, a guarantee against imposition penalties by the FPPC. That type of immunity can only be achieved by seeking an advance advisory letter from the FPPC and then complying with the advice rendered. Compliance with an FPPC advice letter renders the public official immune from sanctions by the FPPC and shows good faith in other civil or criminal proceedings. Please note that such opinions may require a substantial amount of lead time. Kronick is available to assist you in obtaining such an opinion.

In addition, informal advice is available from FPPC staff. Compliance with such advice does not, however, provide any immunity.

Other Conflict of Interest Laws

While less well known than the Political Reform Act, there are a number of other conflict of interest laws that apply to public officials. These include:

1. **Government Code section 1090**, provides that a contract is void if made by a member of the legislative body or an employee, including some consultants, who is "financially interested" in the contract. This section is a complete prohibition and cannot be avoided by the interested member abstaining from participation in the decision.

Violation is a felony. There are a number of full or partial exceptions to Section 1090, therefore, you may want to consult your legal counsel if you think you may have a Section 1090 conflict.

2. **California Constitution Article XII, section 7**, prohibits a public official from accepting any free or discounted pass from any transportation company (e.g., a plane, bus, or train company). Violation results in automatic forfeiture of office.
3. **Common law**, has led courts to hold that a conflict of interest exists whenever a public official cannot exercise his or her duties without "disinterested" diligence for the benefit of the public. The official is disqualified from participating in the matter whether the interest is financial or nonfinancial.
4. **Health & Safety Code section 34281**, prohibits housing authority officials from acquiring an interest in any housing project or acquiring an interest in any contract or services to be furnished to any housing project.
5. **The Doctrine of Incompatible Offices**, codified as Government Code section 1099, prevents a public official from simultaneously holding multiple offices that are "incompatible."

ABOUT KRONICK

Attorneys at Kronick serve as general, litigation, labor, and bond counsel to more than 100 public agencies statewide, including cities, counties, water districts, community services districts, joint powers authorities, fire protection districts, irrigation districts, flood control districts, public utility districts, school and community college districts, and special assessment districts.

Kronick attorneys regularly advise public officials on matters involving California's open meeting law (the Ralph M. Brown Act), conflicts of interest and laws pertaining to legislative body member liability. Other typical services include advice on matters of public finance, labor and employment, resource, land use planning, environmental law, land acquisition and eminent domain, economic development, construction, public utilities, public contracts, the setting of rates and charges, the drafting of legislation, and the acquisition of regulatory permits and licenses.